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"AN ASSESSMENT OF FREEDOM OF INFORMATION LEGISLATION IN CANADA"

LEGISLATIVE INTERN
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A democracy requires citizenship participation to ensure fundamental freedoms. However, reality is much different from this theoretical vision of democracy and democratic society now consists of a dependence on experts and specialists. Naturally, people cannot be expected to be familiar with all kinds of knowledge. However, public access to information would ensure the greatest possible opportunity for political judgement on part of citizens. It is for this reason that Freedom of Information legislation would be a step in the direction of more democratic participation.

Rousseau appreciated this contradiction in democratic society when he commented on England in his work, The Social Contract:

> "The people of England regards itself as free, but it is greatly mistaken: it is free only during the election of members of Parliament. As soon as they are elected, slavery overtakes it and it is nothing."[1]

In light of the relationship between the democratic process and Freedom of Information legislation, it is timely that the status of such legislation be examined in all the jurisdictions of Canada.

Freedom of Information legislation has been the focus of national and international attention for several decades. Although such legislation has been introduced provincially and federally, Canada does not yet possess an admirable record

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[1] Jean Jacques Rousseau. The Social Contract. Hafner Press: London, 1947. Page-85.

in this area. Considering the consistent introduction and similarly consistent failure to pass such legislation, what is the present status of Freedom of Information legislation in Canada? Is there any expectation that provincial or federal legislation will be passed?

Provincially, Freedom of Information legislation has not been a sought after goal. Most of the provincial governments have spoken out against Freedom of Information legislation or not acted at all in initiating such legislation.

The Government of Alberta is on record as opposing the need for Freedom of Information legislation. The Premier, Peter Lougheed, has stated that: "Freedom of Information is a matter of course at the Alberta Legislature"[2]. In other words, the Government does provide information when requested. The Attorney General, Neil Crawford, has also described the movement for Freedom of Legislation as: "something of a fad"[3].

However, the need for Freedom of Information legislation has come to the attention of the Legislature, not only in 1982, but also every year since 1974. A.W. Ludwig, Socred M.L.A. for Calgary-Mountainview introduced the first bill for Freedom of Information legislation. New Democratic Party Leader, Grant Notley, has introduced such legislation repeatedly in the past few years. Socred M.L.A., Walter Buck, has done the same. Only one member of the Conservative

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[2] Calgary Herald. September 22, 1981. Page- I6.

[3] Edmonton Journal. June 9, 1982. Page-A6.

Government has ever spoken in favour of the bill, Tom Sindlinger, M.L.A. for Calgary Buffalo, and now sitting as an Independent.

The state of Freedom of Information legislation in other jurisdictions in Canada is in a state of flux and uncertainty. In British Columbia, Freedom of Information legislation has been a subject of review for an extended period of time. Several Private Member's Bills have been introduced, although no legislation has been passed. There does exist legislation that considers some related Freedom of Information areas. In 1967, the Consumer Protection Act was passed which allows for more disclosure of marketplace information. The Human Rights Code was passed in 1973 and established the authority of the director to obtain information concerning human rights issues. Finally, in 1977, the Ombudsman Act was passed to allow for broad powers of inquiry for Ombudsman investigations.

Saskatchewan possesses a history of proposed legislation that has been introduced by Opposition members since 1975. Legislation was first introduced by Stuart Cameron, a Liberal M.L.A. A Progressive Conservative M.L.A., Bob Andrew, again raised the matter in 1978. The Saskatchewan Ombudsman has also lobbied for such legislation. The past Government's attitude to such legislation was epitomized by Roy Romanow, who declared in July, 1981, that a study would need to be initiated before any decision was made. A study conducted under Justice E.M. Culliton was commissioned in July of last year and has a year until a final report is due. It will be interesting to see what the new government

will decide.

Manitoba has not supported Freedom of Information legislation in the past few years. The past Premier, Sterling Lyon denounced Freedom of Information legislation in terms of the American Freedom of Information Act:

> "the kind of thing no Government in Canada should consider passing. No administration would be wise to emulate the legislation passed in the U. S.A."[4]

However, the present Premier, Howard Pawley, has stated that his government will be examining the issue.

Ontario has witnessed the introduction of Freedom of Information bills in 1974, 1975, and 1976. Premier William Davis stated his objections to such legislation publicly over the years. However, a Conservative candidate in the 1979 election, organized a group of Conservative lawyers and released a proposed Freedom of Information Bill. As a result of sustained Cabinet opposition, a Royal Commission was appointed. The Throne Speech of 1980 reiterated the intention to introduce Freedom of Information legislation. However, the Government is still waiting for the findings of an additional study commissioned by the new Minister in charge of Freedom of Information, Norman Sterling. Perhaps the most representative comment of the Government's attitude towards Freedom of Information is Attorney General Roy McMurtry who stated in Question

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[4]Centre for Investigative Journalism. Freedom of Information Status Report. Regina, 1981. Page-11.

Period on June 24, 1981:

> "The Freedom of Information legislation in the United States has succeeded in almost totally discouraging the exchange of important intelligence information between police forces in the United States, with the result that their law enforcement has been seriously undermined."[5]

Quebec has introduced a Freedom of Information bill that is effective legislation. Communications Minister, Jean-Francois Bertrand produced the bill which proposes access to documents of all government bodies, crown corporations, hospitals, school boards, and municipal governments. First introduced in 1981, the bill has not yet been passed.

New Brunswick passed The Right to Information Act in 1978. However, there are apparently weaknesses in the legislation. First of all, in a dispute, the Ministers and departments are represented by government legal counsel, a distinct advantage over the resources of the ordinary citizen. Secondly, there is no time restriction for court-ordered documents from the government. Both these weaknesses have seriously affected the credibility of Freedom of Information legislation.

Newfoundland has also passed such legislation in June of 1981. The Act did not become law until January of 1982. Consequently, there is little information as to its effectiveness at this time. Theoretically, the Act does seem serious in its intentions. It incorporates a 'burden of proof' clause whereby all information must be made available by the government unless there is an acceptable exception. "It is up to the government to establish why the information

[5] Ibid. Page-15.

should be denied, not up to you to prove why you should have access to it."[6] After initial requests for information are made to the Minister, appeals are then made to the provincial ombudsman and if necessary to the Supreme Court. The first steps take thirty days, and naturally, there is no limit on the court decision.

The general rule of access allows three exceptions: non-discretionary documents (Cabinet), personal information and discretionary information (law enforcement, federal-provincial relations, and financial and scientific trade secrets). There is an obligation on behalf of the government to also inform third parties of requests for information which would affect them in some manner.

Nova Scotia has the reputation of being the first jurisdiction to enact Freedom of Information legislation. This fact is somewhat misleading in that the legislation is not effective in any serious way. There is a list of possible areas where access to information is allowed. This list is very narrow; in addition, the appeal process is made to the provincial legislature, which allows the government to be the final judge of its own decisions.

At this time, Prince Edward Island has no plans to introduce Freedom of Information legislation.

There has been a long, substantial history of federal involvement in Freedom of Information legislation. As

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[6] Ibid. Page-22.

early as 1948, the Canadian Government made a statement at the United Nations Conference on the Universal Declaration of Human Rights:

> "Canada is a democracy which cannot be maintained without a foundation of free public opinion and free discussion within the limits set by the civil and criminal laws of Canada. Freedom of Information is inherent in the Canadian constitution, but it is not specifically enacted."[7]

A New Democrat Party M.P., Barry Mather, was the first M.P. to introduce a Freedom of Information bill in the House. This was followed by a Royal Commission on Security in 1968 and a Task Force on Government Information in 1969. In 1972, Barry Mather again introduced Bill C-98, an Act to assure the public's rights to access to public documents. At the same time, Gerald Baldwin, a Conservative M.P., introduced Bill C-118, an Act respecting the right of the public to information concerning the public business in the House. John Roberts, a Liberal M.P., introduced the same kind of legislation on the same date.

The years to come witnessed a constant introduction of bills pertaining to Freedom of Information. Gerald Baldwin again introduced a bill in 1973, 1974, and the fall of 1974. Barry Mather also introduced a bill again in 1974. A series of reports continued to discuss the need for such legislation. The Provision of Government Information prepared by Don F. Wall, a Privy Council Officer, was released in 1975. Access to Law under the

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[7] Ingrid C. Langhammer (Ed.). Freedom of Information Package. University of Alberta: Edmonton , Alberta. 1981. Page-1.

Law Reform Commission was also released in 1975. In 1976, the Speech from the Throne promised that a policy paper on Freedom of Information would be published soon and referred to the parliamentary committee. In 1977, the Green Paper: Legislation on Public Access to Government Documents was published. The paper was generally critical of reducing ministerial powers over secrecy. It was referred to the Standing Joint Committee on Regulations and Other Statutory Instruments for public hearings, which lasted until 1978. In 1978, the Index of Federal Information Banks was published. This listed files containing personal information. On June 28, 1978, the Standing Joint Committee on Regulations and Other Statutory Instruments submitted its Fifth Report, a reply to the Green Paper. Narrow exemptions and a two tier review (an Information Commissioner and an ultimate appeal to the Supreme Court) were recommended.

Again in 1978, the Liberals' Speech from the Throne stated the intention to introduce Freedom of Information legislation. The Standing Joint Committee re-submitted its Fifth Report to the House in 1979. Gerald Baldwin recommended acceptance of the report and a motion was passed in the House.

In 1979, the Canadian Bar Association released its Model Bill on Freedom of Information. This bill also provided for limited exemptions and a two tier review.

In 1979, the Privy Council Office published its version of possible legislation. In the same year, John Roberts, Secretary of State, outlined the Liberal Government's Freedom of Information proposal. It provided for an Information Commissioner but no judicial review. The Minister would have final say on all matters concerning Freedom of Information exemptions. In October, 1979, Walter Baker, President of the Privy Council, introduced Bill C-15, an Act to extend present laws concerning Freedom of Information and the Canada Evidence Act, the Federal Court Act and the Statutory Instruments Act. This bill recommended a two tier system of review. This was the first Government sponsored bill of its kind. In November, 1979, Bill C-15 received second reading and was referred to the Standing Committee on Justice and Legal Affairs for detailed consideration. The Privy Council Office in 1979, released a paper, Freedom of Information Exemptions , which compared Bill C-15, the Bar Association Bill and the Joint Standing Committee Report of 1978.

In 1980, both the Conservative Government, seeking re-election and the New Democratic Party reaffirmed their committment to Freedom of Information legislation. The same year, Pierre Trudeau, stated that "his party is now going towards judicial review and that he is now ready to receive arguments in favour of judicial review"[8]. Again in 1980, the Speech from the Throne promised legislation. Finally,

[8] Ibid. Page-4.

in 1980, Francis Fox , a Liberal M.P. and Secretary of State, introduced Bill C-43, an Act to enact the Freedom of Information Act and the Privacy Act. After being read for a second time in 1981, it was referred to the Standing Committee on Justice and Legal Affairs. Public briefs were also presented in 1981 as was a clause by clause study.

As of June, 1982, it would appear that Freedom of Information legislation will be passed. However, an amendment has been introduced which would strengthen cabinet's right to keep certain documents secret. Opposition members have been reticent to accept such an amendment; however, "they agreed to it when Communications Minister, Francis Fox, said the alternative might be for the bill to die when the current parliamentary session ends... June 30."[9] The amendment concerns the controversial principle of Crown privilege, which allows Cabinet Ministers to withhold documents even from the courts. The Government has also responded to pressure from the New Democratic Party and incorporated release of environmental testing results in the legislation and more importantly, shortened the period in which the Act will be phased in.

There are still substantial objections from provincial premiers with regards to federal Freedom of Information legislation. The provinces have feared release of confidential federal-provincial information. In the light of passed legislation, the provinces have voiced the concern that the

[9] Edmonton Journal. February 4, 1982. Page- A 10.

provinces will hold back much information and thus hamper the free flow of information between governments. However, this concern would seem somewhat pointless considering the fact that there are restrictions of much federal-provincial information in the bill.

To be critical in one's judgement of the present status of Freedom of Information legislation in the country, it is necessary to do a succinct comparison with other countries. How does Canada compare internationally in the area of Freedom of Information?

Sweden is one of the most advanced countries in the world in terms of such legislation. It can trace the existence of open documents back to 1776. The most recent public access law dates from 1937 when amendments were enacted. The basic legal principle is that all governmental papers are open to all persons unless explicitly closed by provisions of the Act. Where access is denied, a system of appeal and review has been established. Swedish regulations allow secrecy for the records of Cabinet meetings, parliamentary committee meetings, correspondance, and draft papers of administrative organs. In addition, the parliamentary ombudsman have exceptional powers of access to protect public interest. At this time, there are three co-equal ombudsmen to inspect the civil and military administration. There have also been recent appointments of an antitrust ombudsman, a consumer ombudsman, and a press ombudsman. Each of these ombudsmen is responsible to parliament.

In situations where disputes develop over the release of documents, administrative and judicial courts can resolve such disputes although final responsibility lies with Cabinet and parliament. If a committee demands documents and it is backed in that demand by a parliamentary majority, it would be a matter of confidence if the material was not presented.

It is interesting to note that according to Itzhak Galnoor: "the average Swedish citizen rarely exercises his right to see public documents, but the press has frequently seized the opportunity."[10] The openness in Swedish government is reflected in the fact that government agencies anticipate routine press review by exhibiting the most important documents on a daily basis.

In comparison, Britain does not possess a tradition of the 'right to know' at all. The right to free speech has been the most important historically to the British. The right of free inquiry is yet to attain complete recognition.

The United States is more open in its political style. A Freedom of Information Act was passed in 1966, with amendments in 1974 and 1975.

> "In enacting the Freedom of Information Act, the USA has adopted a policy that 'any person' should have clear access to identifiable agency records without having to state a reason for wanting the information and that the burden of proving withholding to be necessary is placed on the Federal agency."[11]

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[10] Itzhak Galnoor. (Ed) Government Secrecy in Democracies. Harper Colophon Books: New YORK. 1977. Page- 259.

[11] L.G. Sherick. How to Use the Freedom of Information Act. Arco Publishing: New York. 1978. Page-9.

The following exemptions are included in the American Act:

1) matters following from an Executive order that concern national defense or foreign policy
2) internal practices of an agency
3) statute related matters that forbid disclosure
4) trade secrets
5) interagency and intra-agency matters which are a matter of law
6) personnel and medical files
7) law enforcement procedures that cannot be disclosed
8) some geological and geophysical material
9) information concerning the regulation of financial institutions

It is apparent that the American Act contains as many exemptions as any moderate Freedom of Information legislation would. However, the difference lies with the fact that the burden of proof is with the American Government.

Finally, to fully comprehend the slow advance of Freedom of Information legislation in Canada, one must examine some of the more controversial issues involved in preventing such legislation. One of the more plausible concerns is that Freedom of Information legislation will encourage bureaucrats not to record information as accurately as they do at this time. In addition, there is the belief that the concept of ministerial responsibility should not be tampered with. It is a parliamentary tradition. The costs of implementing an intensive bureaucracy that can handle Freedom of Information requests and appeals has also been raised as an objection. Lastly, there is always the fear that confidential information will be accidentally released.

On the other hand, there are compelling reasons to introduce Freedom of Information legislation. The

most obvious is the perception that such legislation is a fundamental right as in freedom of speech. In addition, the argument that "access to information is essential for a working, participatory democracy"[12] is a strong one. To accurately assess a government, the citizens must possess knowledge of its operations. Such access to information will also ensure the protection of civil liberties and rights. An individual could find out what government information exists about him and consequently protect himself against confidential circulation.

To resolve the advantages and disadvantages of Freedom of Information legislation, one must propose 'intelligent' legislation. To protect against the fear of release of confidential documents, it is certain that some information cannot be made public. Such sensitive areas would be international relations, national defense, national security, and federal-provincial relations. The concern about ministerial responsibility must realistically be addressed. It would seem illogical and questionable to allow government final say as to what documents are accessible. Ministerial responsibility can be respected up to a point. A form of review, either in terms of an Information Auditor or judicial review or both, can be the only way of fairly assessing appeals. The possibility of bureaucrats not recording in a complete fashion their information is very likely. However, as witnessed in countries that possess Freedom of Information legislation, this change does not seem to impede the process of governing.

[12] Canadian Bar Association. Freedom of Information in Canada. Ottawa: 1979. Page-6.

The last objection of exceptional cost would not seem to be a strong consideration in light of the advantages to the public of such legislation.

Considering the compelling arguments for Freedom of Information legislation and the seemingly resolvable problems with its application, it is time that Canada committed itself to such legislation. The present passing of the Freedom of Information Bill in parliament perhaps indicate that the Federal Government realizes this. The unstable and distrustful political climate in many parts of Canada that seems to focus on the Federal Government also would be an indicator of the need for such open legislation. As the President of the Canadian Bar Association, Paul Fraser, pointed out when analyzing the present state of Canadian politics:

> "We believe there is a growing lack of trust that is developing between the people of Canada and the government. This in turn has led to what can be termed a crisis of confidence. The attitude of many bureaucrats on this question could be best summed up as 'what the people don't know, can't hurt the Minister.' It's an unhealthy attitude for participatory democracy."[13]

As a consequence, one can only applaud the present Bill about to be passed in parliament and hope that provincial jurisdictions will soon follow suit. Canadian Freedom of Information legislation is long overdue in the international world of democratic participation.

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[13] Ibid. Page-13.

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